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UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

United States of America, )  
)  
Plaintiff, )  
)  
v. )  
)  
Frank Fernandez, aka "Sapo"; Juan )  
Garcia, aka "Topo"; Mariano Martinez, )  
aka "Chuy"; Jimmy Sanchez, aka )  
"Smokey"; Crispin Alvidrez, aka )  
"Conejo"; Fernando Alvidrez, aka )  
"Cuate"; Javier Alvidrez Duarte; Marcel )  
Arevalo, aka "Psycho"; Daniel Bravo, aka )  
"Sporty"; Mario Castillo, aka "Whisper"; )  
Robert Cervantes, aka "Gypsy"; Roy )  
Galvador, aka "Spider"; Dominick )  
Gonzales, aka "Solo"; David Gonzales- )  
Contreras, aka "David Contreras- )  
Gonzales"; Gerardo Jacobo, aka )  
"Blanco"; Robert Mercado, Jr., aka )  
"Gato"; Ernesto Murillo, aka "Solo"; )  
Adrian Nieto; Rolando Ontiveros, aka )  
"Rolo"; Sally Peters; Jesus Ramirez, aka )  
"Juan Carlos Alvarez," aka "Dreamer"; )  
Roland Ramirez, aka "Capone"; Jesus )  
Rochin, aka "Gizmo"; Suzanne )  
Schoenberg, )  
)  
Defendants. )  
\_\_\_\_\_ )

CASE NO. CR 99-83(A) DOC

**ORDER REGARDING THE  
ADMISSIBILITY OF THE  
TESTIMONY OF MICHAEL  
ORNELAS AND MICHAEL  
GONZALES**

Six weeks after the start of this third phase of the Mexican Mafia trials, the government sought to call two newly discovered witnesses, Michael Gonzales and Michael Ornelas, to testify about the

1 disposal and retrieval of the guns used in the Montebello murders. Ornelas could testify that Arevalo  
2 had brought him two .380s and asked him to hide them, while Gonzales could testify that Arevalo had  
3 asked him to get rid of the guns. In addition, Gonzales could testify that Castillo confessed to the  
4 murders, implicating himself, Arevalo, and Jacobo.

5 Defendants originally objected that their rights under the Confrontation Clause would be  
6 violated. Then, Castillo objected also on the grounds that in a capital case, the government is required to  
7 produce its witness list three days prior to the start of trial, pursuant to 18 U.S.C. § 3432. He argues that  
8 since Gonzales and Ornelas were not on the witness list three days before the trial, their testimony  
9 should be excluded.

10 The government argues that § 3432 does not require exclusion, and that if allowed in, under a  
11 recent Ninth Circuit case the testimony would not violate the Confrontation Clause and could be  
12 admitted in full.

13 The Court, after thorough briefing and oral argument, holds that § 3432 does indeed require  
14 exclusion of the testimony as it relates to Jacobo and Castillo. However, it does not require exclusion of  
15 testimony concerning Arevalo. At the same time, because the parties raised Confrontation Clause issues  
16 and because it may become relevant at some later date, the Court also holds that the Confrontation  
17 Clause would not be violated if the testimony concerning Jacobo and Castillo were admitted.

## 18 I.

### 19 SUMMARY OF PROPOSED TESTIMONY FROM INTERVIEWS 20 AND IN-COURT HEARINGS OUTSIDE THE PRESENCE OF THE JURY

21 The government has interviewed both Gonzales and Ornelas and has produced copies of 302  
22 reports of those interviews. The information in the 302s is the proposed testimony. The Court has also  
23 conducted a hearing outside the presence of the jury which has included the testimony of Michael  
24 Ornelas and Michael Gonzales.

#### 25 A. Ornelas

26 Michael Ornelas, aka "Clarence," was interviewed by the government and the FBI on June 15,  
27 2001 and June 24, 2001. He primarily discussed the disposal of two .380 guns. In his first interview, he  
28 said he did not do any favors for anyone in November of 1998, primarily because he was too strung out

1 on drugs. In the second interview, he stated that he had kept the two guns hidden, and had helped  
2 dispose of them some six months later.

3 Ornelas grew up with a number of the defendants, including Castillo, Jacobo, and Cervantes. He  
4 was friends and neighbors with Arevalo. Ornelas was not affiliated with gangs, though he did do drugs.  
5 He does auto body work and painting for a living, including for individuals living in the City Terrace  
6 area. He used to do detailing on Arevalo's van.

7 At some point late in 1998, Arevalo brought two small semi-automatic guns to Ornelas, who  
8 was at his parents' house in City Terrace. One gun was black, one was chrome, and they were wrapped  
9 in rags. Ornelas took the guns back to his house in Pico Rivera and buried them in his backyard. He  
10 assumed the guns had been used in a crime.

11 Ornelas believes that some time after that, Arevalo had chrome after-market rims removed from  
12 his van and replaced with stock rims. The mechanic who did this is Johnny Arellano. Ornelas thinks the  
13 mechanic sold the rims.

14 Ornelas first learned that Arevalo had been arrested from television news. At some point after  
15 Arevalo's arrest, Gonzales, whom Ornelas knew to be a City Terrace gang member, came to Ornelas's  
16 house to get the guns. Together, they dug up the guns although they had some difficulty in finding them  
17 at first. They then took the guns apart. They then drove, in Ornelas's car, to various locations in Pico  
18 Rivera and Montebello. Gonzales threw a frame of one gun from a bridge over the San Gabriel River.  
19 Other parts were thrown out near the Montebello Town Center, alongside Plaza Drive. At one point,  
20 Gonzales got out of the car, ran up a hillside and threw items over a chain link fence. Ornelas showed  
21 investigators these approximate areas.

22 Ornelas is familiar with one of the victims, Richard. Richard's family used to own property in  
23 City Terrace. Richard was a drug dealer.

#### 24 **B. Gonzales**

25 Gonzales spoke to the FBI and the prosecution on June 24, June 26, and July 2, 2001. Generally,  
26 he discussed disposing of two guns thought to be the guns used in the Montebello murders; his  
27 connections to various defendants; and what he was told about the murders. There are inconsistencies,  
28 at least one of which he acknowledges. The following summary is a compilation of the three interviews.

1           **1.     Background**

2           Michael Gonzales is 32 years old. He was originally a member of a street gang known as Slowz  
3 13. Other members included Arevalo and Castillo; Castillo joined after Gonzales was imprisoned again  
4 in 1994. Gonzales was in state prison between 1991 and 1993 for commercial burglary, and imprisoned  
5 again in 1994 for vehicular manslaughter related to a drunk driving accident. He was released on or  
6 about May 1, 1999. During that particular incarceration, Slowz 13 merged with the City Terrace gang;  
7 Gonzales was “walked” into the City Terrace gang because of his incarceration. He was not an official  
8 leader of the gang, but had some respect due to his relatively older age and prison background.

9           During his incarceration for vehicular manslaughter, he spoke often with Arevalo after Arevalo  
10 was released from California Youth Authority. He has known Arevalo since childhood. In 1997 and  
11 1998, Gonzales called Arevalo every one to two weeks; Arevalo sent both money and care packages to  
12 Gonzales while Gonzales was incarcerated. Gonzales has also known Castillo since Castillo was in  
13 “pampers.” He only met Jacobo, however, after Gonzales was released from prison in May 1999. He  
14 had talked with Jacobo several times previously, all while Jacobo was not in custody.

15           Gonzales also knows Kenneth Cervantes; it was from Cervantes that Gonzales first learned that  
16 Slowz 13 had merged with City Terrace.

17           Gonzales was released from prison in May 1999.

18           **2.     Mexican Mafia**

19           Gonzales is familiar with the Mexican Mafia due to his time in prison. However, he also stated  
20 that he knew that Arevalo was becoming more and more involved with the Mexican Mafia between  
21 1997 and 1998, the period when the two talked often on the phone. He told Gonzales that he was  
22 “running with the homies.” Gonzales understood this to be a reference to the Mexican Mafia. On other  
23 occasions, Arevalo referenced Mono and Chuy, whom Gonzales knew to be members of the Mexican  
24 Mafia.

25           Gonzales also thought that Castillo was “sponsored” by the Mexican Mafia, and received much  
26 of his “juice” from Arevalo. Castillo at one point was seeing a former girlfriend who also was  
27 associated with Mexican Mafia member Mono. Castillo collected money from other neighborhoods on  
28 behalf of Arevalo. He was doing so at least during May 1999. At some unspecified time, Castillo

1 recruited Gonzales to help him collect extortion money from the City Terrace neighborhood. Gonzales  
2 did so on a couple of occasions but did not want to be involved in that criminal activity. However,  
3 Gonzales also says that Arevalo asked him to take over Castillo's tax collection because Castillo was  
4 wanted by the police. Gonzales did so on two occasions. At some unspecified times, Gonzales warned  
5 Arevalo and others not to become involved with the Mexican Mafia.

### 6 **3. Montebello Murders**

7 Prior to his release in May 1999, and prior to Arevalo's arrest in February 1999, Gonzales had  
8 heard about the Montebello murders from Arevalo. In at least one phone call initiated by Gonzales from  
9 Calipatria State Prison, Arevalo implicated himself and others in the murders. At some point before  
10 New Years, 1999, Arevalo told Gonzales that he, Jacobo, and Castillo "took care of some business" in  
11 either Whittier or Montebello "for the homie." Gonzales took this to mean that they did something, such  
12 as an assault, for the Mexican Mafia.

13 Gonzales found out that Arevalo had been arrested when he called Arevalo's home sometime  
14 after the arrest. Arevalo's wife Mindy told Gonzales that Arevalo had been arrested for murder. At this  
15 time, Gonzales believed that Arevalo, Jacobo, and Castillo had killed someone for the Mexican Mafia.

16 Upon his release in May, Gonzales started asking around about Arevalo and the arrest charges.  
17 About a week after his release, he went to borrow money from Kenneth Cervantes. There, he met  
18 Jacobo for the first time, although he had spoken with him on the phone.<sup>1</sup> Cervantes was vague about  
19 what had happened with Arevalo.

20 Shortly after meeting with Cervantes, about one or two weeks after his release, Gonzales met  
21 with Castillo in front of Castillo's house. Castillo said that he and Jacobo had taken someone out "for  
22 the big homies" because that person owed the homies some money. Gonzales then scolded Castillo for  
23 getting involved in such things while his girlfriend was pregnant.

24 Several weeks later, Gonzales and Castillo met again at Castillo's house, and Castillo told him  
25 more details. He told him that he, Jacobo, and Arevalo were called and told to go to a shop, either a  
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27 <sup>1</sup> At a hearing out of the presence of the jury on July 26, 2001, Gonzales testified that at  
28 that time he learned that Jacobo lived with Cervantes.

1 body shop, tire shop, or stereo shop, in order to locate the victim. Once there, they called an unidentified  
2 person and stated that they had found the victim and asked what to do. They were told to carry out the  
3 murder. They pulled up to the shop in a van; Castillo and Jacobo entered the shop and started shooting.  
4 Castillo said that the intended victim was named Richard and that Gonzales should know him as he used  
5 to live in his neighborhood. Castillo told Gonzales that Richard had “burned the wrong person” for  
6 either money or drugs.

7 Gonzales did not talk to Castillo again about the murders. Although the timing is somewhat  
8 confusing, in his second interview, Gonzales also said that Castillo told him “that he had used the same  
9 guns [referred to by him in a previous interview with the FBI] to commit murder at an auto body shop  
10 somewhere in either Whittier or Montebello, California.”

11 At some point after May 1999, Arevalo passed a message to Gonzales via Mindy that Gonzales  
12 should warn Jacobo and Castillo to leave the neighborhood because they would be arrested in connection  
13 with the murder. Gonzales passed this message on to the two of them at his house.

14 In early June of 1999, Gonzales was told by Mindy that Arevalo wanted him to contact Ornelas,  
15 aka Clarence, to dispose of some guns. In his first interview, Gonzales said that he received a letter from  
16 Arevalo, that he recognized the handwriting and that he burned it after reading it. Later, he stated that  
17 Mindy simply passed on the message from Arevalo personally and that he had lied to protect Mindy. He  
18 was told to “get rid of the things,” which he understood to mean the murder weapons, and that  
19 “Clarence” had the guns. In his interview on June 24, 2001, Gonzales states that he first went to  
20 Ornelas’s parents’ house in City Terrace and then went to Ornelas’s house in Pico Rivera. Gonzales  
21 thought that Ornelas might be an informant.

22 Gonzales and Ornelas dug up the guns, both semi-automatic .380s. They then took the guns  
23 apart into two pieces, the grip and barrel, and the slide. They tried to dispose of the pieces where they  
24 would not be found. Gonzales threw the grip and barrel of the chrome gun over the south side of a  
25 bridge over the San Gabriel River, and the slide over the north side. They then drove to the area near the  
26 Montebello Town Center. Gonzales discarded the slide of the black gun in bushes at an intersection near  
27 the Town Center. They got back on the freeway, and Gonzales threw the grip and barrel at a split at the  
28 Garfield exit. Upon returning home, he called Mindy and told her that he had taken care of Arevalo’s

1 request. After Gonzales's first interview, he accompanied law enforcement to the sites.<sup>2</sup>

2 On the morning of the first attempt to arrest Castillo, Gonzales picked him up in City Terrace and  
3 drove him to his sister's house in South Central Los Angeles. Gonzales and his wife Charlene gave  
4 Castillo \$150.00. Then, on either August 2 or 3, Castillo came to a party at Gonzales's house. Gonzales  
5 himself was arrested that night.<sup>3</sup>

## 6 II.

### 7 RIGHT TO COUNSEL (*MASSIAH* ANALYSIS)

8 Jacobo's counsel has raised the possibility of making a *Massiah* objection to the testimony of  
9 Gonzales and Ornelas. See *Massiah v. United States*, 377 U.S. 201, 202, 84 S. Ct. 1199, 1201, 12 L. Ed.  
10 2d 246 (1964). However, there is no evidence that either was a government informant at the time of the  
11 statements in question. Further, as to statements made by Arevalo and Castillo before they were  
12 arrested, there could not be a *Massiah* issue as no right to counsel would have attached. Any questions  
13 of whether Gonzales or Ornelas is now getting a benefit from the government in exchange for this  
14 testimony, such as a promise from the government not to charge them with aiding and abetting for their  
15 actions with the guns, goes to credibility under the *Boone* analysis.

## 16 III.

### 17 RIGHT TO CONFRONTATION (*BOONE* ANALYSIS)

18 The defendants implicated in Arevalo and Castillo's statements argue that admission of the  
19 statements against them would violate their rights under the Confrontation Clause of the Sixth  
20 Amendment. The amendment states that "in all criminal prosecutions, the accused shall enjoy the right  
21 . . . to be confronted with the witnesses against him." "The Confrontation Clause forbids the use of  
22 hearsay against a criminal defendant at trial unless the evidence 'falls within a firmly rooted hearsay  
23 exception' or otherwise contains 'particularized guarantees of trustworthiness.'" *United States v. Boone*,  
24 229 F.3d 1231, 1233 (9th Cir. 2000) (quoting *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539,  
25 65 L. Ed. 2d 597 (1980)).

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26  
27 <sup>2</sup> Law enforcement and Gonzales recovered portions of the guns.

28 <sup>3</sup> The reasons for this arrest are not in the record but appear to be unrelated to this case.

1 In a recent case, the Supreme Court held that a non-testifying accomplice’s confession to law  
2 enforcement officers violated the defendant’s right to confrontation even though the confession  
3 implicated the accomplice because it did not contain guarantees of trustworthiness. *Lilly v. Virginia*, 527  
4 U.S. 116, 139, 119 S. Ct. 1887, 1901, 144 L. Ed. 2d 117 (1999).<sup>4</sup> The Supreme Court has not  
5 specifically addressed situations in which the confession is made to a co-conspirator or accomplice  
6 rather than law enforcement.

7 **A. Gonzales**

8 **1. Reliability of Arevalo’s and Castillo’s Statements to Gonzales**

9 The Ninth Circuit recently addressed whether an accomplice’s statements to someone who is not  
10 in law enforcement are admissible under *Lilly*. In *Boone*, the Ninth Circuit held that an accomplice’s  
11 statements to his girlfriend that implicated both the accomplice and the defendant were admissible  
12 against the defendant because the statements contained “particularized guarantees of trustworthiness.”  
13 229 F.3d at 1234. The accomplice-declarant and the defendant had participated in the robbery of a rug  
14 store. *Id.* at 1232. The court distinguished the situation from *Lilly* because the accomplice was not  
15 talking to law enforcement and because he did not try to shift blame. *Id.* at 1234. The accomplice was  
16 talking to his girlfriend, not law enforcement. *Id.* at 1232. The fact that the girlfriend was taping the  
17 conversation for law enforcement was unknown to the accomplice. *Id.* Therefore, at that time, he had  
18 no reason to lie. *Id.* at 1234. In addition, the accomplice did not in fact shift blame. *Id.* He inculcated  
19 himself as well as the defendant, unlike in *Lilly*. *Id.* The Ninth Circuit considers these two factors,  
20 communication with non-law enforcement, and no shifting of blame, as indicia of reliability post-*Lilly*.  
21 As further indicators of reliability, the *Boone* court also considered whether the declarant’s statement  
22 itself was reliable. The accomplice-declarant’s statement included details that would not be likely to  
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24 <sup>4</sup> The Court should examine the circumstances in which the statement was made; *not*  
25 whether other evidence corroborates the substance of the statement. *See Lilly v. Virginia*, 527  
26 U.S. 116, 137-38, 119 S. Ct. 1887, 1900, 144 L. Ed. 2d 117 (1999) (“[T]hat other evidence at  
27 trial corroborated portions of [the declarant’s] statement is irrelevant. We have squarely rejected  
28 the notion that ‘evidence corroborating the truth of a hearsay statement may properly support a  
finding that the statement bears ‘particularized guarantees of trustworthiness.’”) (quoting *Idaho*  
*v. Wright*, 497 U.S. 805, 822, 110 S. Ct. 3139, 3150, 111 L. Ed. 2d 638 (1990)).

1 have been fabricated. For example, the declarant mentioned that President Bush was nearby playing  
2 golf, thus making the robbery more difficult. He also mentioned that the defendant had shooed away a  
3 customer during the robbery. *Id.* at 1232.

4 **a. Defendant Arevalo’s statements to Gonzales throughout 1997 and 1998**  
5 **indicating his membership in the Mexican Mafia**

6 Gonzales intends to testify that during many phone conversations between him and Arevalo, or  
7 Psycho, during 1997 and 1998, Arevalo told him that he (Arevalo) was “running with the homies.”  
8 Gonzales understood this to mean that Gonzales was associating with the Mexican Mafia. Arevalo  
9 referred to Mono and Chuy. Gonzales knew Chuy to be a Mexican Mafia member. These statements  
10 are admissible against Arevalo as party admissions under Federal Rule of Evidence 801(d)(2)(A),  
11 regardless of whether they are statements against penal interest. As the statements do not incriminate  
12 any other Defendants, they raise no *Boone* or *Bruton* problems.

13 **b. Defendant Arevalo’s statement to Gonzales in December 1999 that Castillo,**  
14 **Jacobo, and Arevalo had “taken care of some business” for “the Homie”**

15 This statement is admissible against Arevalo as a party admission under Rule 801(d)(2)(A).

16 It is also a reliable statement under *Boone*. First, given the facts and surrounding circumstances,  
17 this is a statement against penal interest. The defendants’ method of speaking, as demonstrated by the  
18 numerous tapes, indicates that “taking care of business” refers to taking care of some Mexican Mafia  
19 activities. “The Homie” is Chuy. Second, the circumstances in which the statement was made give it  
20 particularized guarantees of trustworthiness. Arevalo made the statements to Gonzales, who was a close  
21 friend of Arevalo’s. They were both founding members of the Slowz 13 street gang. They spoke on the  
22 phone frequently while Gonzales was in prison in 1997 and 1998 and sent letters through Arevalo’s  
23 wife, Mindy Davis. Their conversations included casual discussion of children and other matters. In the  
24 statement, Arevalo does not shift blame. He does not distinguish between his level of involvement and  
25 the level he ascribes to Castillo and Jacobo. He also had no incentive to lie to Gonzales. He also could  
26 not have been trying to curry favor from Gonzales, as Gonzales was just his buddy, not a higher up in the  
27 Mexican Mafia.

1                   **c. Defendant Castillo’s statements to Gonzales concerning his and Arevalo and**  
2                   **Jacobo’s involvement in the Montebello murders**

3                   Gonzales intends to testify that in May 1999, after he was released from custody and began  
4 asking around to find out what had happened with Arevalo, he met with Castillo in front of Castillo’s  
5 home and Castillo told him that he and Jacobo had “taken someone out for the ‘Big Homies’” because  
6 this person owed money after he “burned” someone. Gonzales also intends to testify that a couple of  
7 weeks later, he and Castillo met again and Castillo described the Montebello murders in some detail,  
8 describing what he, Blanco, and Psycho did, specifically that he and Blanco entered the shop and began  
9 shooting and that the intended victim’s name was Richard.

10                  These statements are admissible against Castillo as party admissions. The statements are also  
11 admissible against Arevalo and Jacobo as statements against penal interest that were made in a setting  
12 giving them particularized guarantees of trustworthiness, under *Boone*. The case for admission is not as  
13 strong as for Arevalo’s statements to Gonzales, because Castillo and Gonzales were only long-time  
14 acquaintances rather than close friends, but the circumstances still are such that Castillo would not have  
15 had any reason to lie to Gonzales. Gonzales stated that he has known Castillo since Castillo was “in  
16 pampers.” Gonzales, a friend of Arevalo’s, came to Castillo to ask about what had happened to Arevalo  
17 and find out why Arevalo was in trouble with the law. Castillo had nothing to gain from lying to  
18 Gonzales. He was not trying to curry favor, as Gonzales was not a higher up in the Mexican Mafia. In  
19 these statements, he does not shift blame to others, as he fully implicates himself as one of the shooters.

20                   **d. Defendant Arevalo’s statements to Gonzales regarding collection of taxes**

21                  Gonzales intends to testify that Arevalo asked Gonzales to take over collection of taxes from  
22 Castillo because Castillo was thought to be wanted by law enforcement.

23                  The government argues that the statement is not hearsay because it is an instruction to do  
24 something and that therefore it is being offered to show the effect on the listener, not for the truth of the  
25 matter asserted. The Court disagrees with the Government that this is being offered for the effect on the  
26 listener. The effect on the listener is that Gonzales did collect money on two occasions, but the  
27 Government has not explained how that fact is relevant to any element of the crimes charged against the  
28 defendants in this case. However, the statement still appears to be non-hearsay. An instruction to do

1 something is not an assertion and cannot be either true or false. Therefore, it is not hearsay.

2 **e. Defendant Arevalo's statements to Gonzales, through Mindy, regarding**  
3 **getting out of town and disposal of guns**

4 Gonzales intends to testify that he received messages from Arevalo through Mindy, Arevalo's  
5 wife. He will testify that Mindy told him that Arevalo had asked her to tell him to tell Castillo and  
6 Jacobo to get out of town because they were wanted by law enforcement.<sup>5</sup> He will also testify that in  
7 mid-June of 1999, Mindy told Gonzales that Arevalo wanted Gonzales to get rid of "the things" which  
8 Gonzales understood to mean the guns. She also told him that an associate of the City Terrace gang  
9 known as "Clarence" was in possession of the guns.

10 The statements to get out of town and to get the guns are instructions. Instructions cannot be  
11 either true or false. An instruction may contain an implied assertion but it is not itself an assertive  
12 statement and thus is not hearsay under Federal Rule of Evidence 801(a)(2). *United States v. Zenni*, 492  
13 F. Supp. 464, 469 (E.D. Kent. 1980) (holding that betting instructions placed over the phone to a  
14 government agent are not hearsay).

15 The statements that Castillo and Jacobo are wanted by law enforcement and that Clarence has the  
16 guns are assertions. However, they are not being offered for the truth of the matter asserted. The  
17 Government is not trying to prove that Castillo and Jacobo were wanted by law enforcement. The  
18 statement is relevant to show Arevalo's belief that they were wanted by law enforcement, his association  
19 with them, and thus his participation in the conspiracy. The statement is relevant to show this  
20 association whether or not they were, in fact, wanted by law enforcement at that time. Further, that they  
21 were wanted by law enforcement is not in dispute and is already obvious to all due to the fact that  
22 Castillo and Jacobo are currently on trial. Similarly, it is not in dispute that the guns were at Clarence's  
23 house, and thus Arevalo's statement to Gonzales through Mindy that Clarence has the guns is not being  
24 offered for the truth of the matter asserted. Instead, it is being offered to show his knowledge of the guns  
25 and his attempts to cover up the crime. It is relevant to show this whether or not he was in fact correct  
26 that the guns were at Ornelas's house.

27 \_\_\_\_\_  
28 <sup>5</sup> Mindy is an unavailable declarant because of the spousal privilege.

1 Thus, none of the statements conveyed from Arevalo to Gonzales by Mindy are hearsay at all.  
2 They are not hearsay within hearsay and the separate levels do not need to be evaluated. Further,  
3 defendants have not cited to the Court any cases in which a non-hearsay statement was excluded as  
4 violative of the Confrontation Clause.

## 5 **2. Gonzales's Credibility**

6 The government and defendants dispute whether the Court, when determining whether there are  
7 particularized guarantees of trustworthiness such that a hearsay statement made against penal interest is  
8 reliable enough to be admitted against someone other than the declarant, should also consider the  
9 reliability and credibility of the person conveying the statement, the relator. Defendants make this  
10 argument because they argue that it is significant that in *Boone*, the statements were tape recorded, thus  
11 leaving no doubt that the statements were in fact made. The only issue in *Boone* was whether the  
12 statements were true when made. In the present case, there is the additional issue of whether the  
13 statements were ever made in the first place. That is, there is the question of the reliability of the relator.  
14 This issue was not addressed in *Boone*.

15 In similar settings, some courts consider only the circumstances surrounding the initial statement  
16 from the declarant to the relator. See *United States v. Shukri*, 207 F.3d 412, 417-18 (7th Cir. 2000);  
17 *United States v. Katsougrakis*, 715 F.2d 769, 777 (2d Cir. 1983); *United States v. Atkins*, 558 F.2d 133,  
18 135-36 (3d Cir. 1977). The rationale behind these courts' approach is that the court must perform some  
19 analysis of the reliability of the declarant because the jury has no opportunity to evaluate the sincerity,  
20 accuracy, memory, and truthfulness of the out-of-court declarant, but the jury can evaluate those aspects  
21 of the relator's testimony.

22 At least one circuit, however, allows the trial court to evaluate both the reliability of the  
23 declarant's statement and the reliability of the relator's testimony about that statement. See *United*  
24 *States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978); *United States v. Bagley*, 537 F.2d 162, 167-68 (5th  
25 Cir. 1976). Under this approach, before admitting such a statement, the Court would need to be satisfied  
26 both that circumstances indicate that the declarant had no reason to lie and also that the relator is now  
27 accurately relating what was said to him or her.

28 The Ninth Circuit has not adopted one approach or the other. In a 1978 decision, the majority

1 opinion discussed the rationales behind both approaches, but held that no choice had to be made on the  
2 facts of the case before it. *United States v. Satterfield*, 572 F.2d 687, 691-92 (9th Cir. 1978). One judge  
3 concurred in the result but stated that he thought a decision should be made and further that the trial  
4 judge should be allowed, within certain parameters, to evaluate the trustworthiness of the relator. *Id.* at  
5 694 (Sneed, J., concurring in the result). The issue did not need to be addressed in *Boone* because the  
6 statements had been tape recorded.

7         Given that the Ninth Circuit has not ruled on this issue, the Court holds that the better approach  
8 is that taken by the Fifth Circuit, under which the trial court may evaluate the credibility of the relator.  
9 When the relator of a hearsay statement is also charged with crimes and is a cooperating witness for the  
10 government, the relator has a significant motive to name others as being involved, as doing so inures to  
11 the relator's own benefit when he is sentenced. Further, while the jury will be the final arbiter of  
12 whether the relator is telling the truth, given that the particularized guarantees of trustworthiness analysis  
13 is in effect an exception to what would otherwise be the result under the Confrontation Clause, it should  
14 be narrowly construed to protect the accused's constitutional rights. *See generally United States v.*  
15 *Paguio*, 114 F.3d 928, 934 (9th Cir. 1997) (stating that “[w]ere it not for the fence around the  
16 Confrontation Clause provided by the hearsay rule, prosecution use [of a hearsay statement] would  
17 implicate the accused's right to be ‘confronted with the witnesses against him’” and noting that the  
18 concerns implicated by the admission of a hearsay statement vary depending on whether it is offered by  
19 the government or the defense because of defendants' constitutional rights). In addition, nothing in *Lilly*  
20 prevents courts from considering the credibility of the relator.<sup>6</sup>

21         Accordingly, the Court holds that in ruling on the admissibility of Gonzales's testimony  
22 regarding statements made to him, the Court may consider whether Gonzales's testimony appears to  
23 meet a minimum level of credibility and could exclude the testimony if it appears that the statements  
24 were not, in fact, ever made to Gonzales in the first place.

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25  
26         <sup>6</sup> Justice Stevens's plurality opinion in *Dutton* holds that the credibility and reliability of  
27 the relator is not relevant to a Confrontation Clause analysis. *See Dutton v. Evans*, 400 U.S. 74,  
28 88-89, 91 S. Ct. 210, 219, 27 L. Ed. 2d 213 (1970). However, this opinion was joined by only  
three other justices and thus does not represent the holding of a majority of the Supreme Court.

1 Defendants argue that Gonzales is not credible because (1) his wife, Charlene Rivera, wanted  
2 Arevalo killed and tried to get other members of La EME to carry out her desire; and (2) he has five  
3 prior felony convictions. In addition, that Gonzales changed his testimony, in his 302 statements, about  
4 how the information came to him through Mindy is a factor possibly suggesting that he is not credible.  
5 The Court held a hearing with Gonzales out of the presence of the jury and evaluated his demeanor and  
6 testimony. Gonzales is a very frightened and reluctant witness, even while under witness protection.  
7 His demeanor brings startling credibility to his testimony. Thus, the Court finds that he is credible.  
8 Defendants of course may argue to the jury that he is not.

9 **B. Ornelas**

10 In November 1998, Arevalo asked Ornales to hide two .380 handguns for Arevalo, and to remove  
11 flashy rims that Arevalo had on his van. To the extent they would otherwise be hearsay, these  
12 statements are admissible against Arevalo as party admissions.

13 **IV.**

14 **WITNESS LIST IN CAPITAL CASES**

15 In capital cases, which have heightened procedural protections for the defendant, the government  
16 must produce a witness list to the defendant “at least three entire days before commencement of trial.”  
17 18 U.S.C. § 3432. The government’s obligation to provide a witness list “is mandatory and defendants  
18 indicted for a capital offense must be given the benefit of its provisions.” *Amsler v. United States*, 381  
19 F.2d 37, 45 (9th Cir. 1967). Failure to include a witness on a witness list, which is in substance the same  
20 as failing to produce a witness list at all when the admissibility of the excluded witness’s testimony is at  
21 issue, is reversible error in capital cases. *Id.*; *see also United States v. Crowell*, 442 F.2d 346, 347-48  
22 (5th Cir. 1971) (reversing and remanding on the grounds that the district court’s failure to exact  
23 compliance with § 3432 would be plain error); *Hall v. United States*, 410 F.2d 653, 660 (4th Cir. 1969)  
24 (stating that failure to comply with § 3432 is reversible error).

25 Some cases draw a bright-line rule and suggest that unnamed witnesses may not, under any  
26 circumstances, testify at trial. *E.g., United States v. Neverson*, 12 D.C. (1 Mackey) 152 (Sup. Ct. D.C.  
27 1880). Other cases suggest that originally unnamed witnesses may testify when the government’s failure  
28 to identify a witness prior to trial was due to circumstances beyond the government’s control, rather than

1 just lack of diligence. *United States v. Gregory*, 410 F.2d 1016, 1019 (D.C. Cir. 1969); *see also*  
2 *Neverson*, 12 D.C. (1 Mackey) (MacArthur, J., concurring) (stating that the government should be able  
3 to call a witness not included on the witness list if the government had “us[ed] the utmost diligence and  
4 exercis[ed] the utmost good faith” but had nonetheless been unable to identify the witness prior to trial).<sup>7</sup>  
5 In such circumstances, the Court must also evaluate the impact of the witness on the defendant, ensuring  
6 that the defendant receives the benefits of § 3432 by having enough time to prepare for the witness and  
7 not being prejudiced. *Gregory*, 410 F.2d at 1019. The Court has been unable to locate any case which,  
8 on its facts, allowed the government to call a witness not on the witness list when the failure was due to  
9 a lesser showing, such as excusable negligence.<sup>8</sup>

10 Here, the government’s failure to identify Ornelas and, through him, Gonzales, appears to be a  
11 simple mistake, but considering all the circumstances it is a mistake due to a lack of diligence and is not  
12 excusable.

13 Ornelas and, through him, Gonzales came to the government’s attention when a new prosecutor  
14 joined the team for this phase of the trial and began reviewing phone records from the day of the  
15 murders. However, defendants argue that the government potentially could have identified Ornelas  
16 through (1) Castillo’s statement to local law enforcement in April 1999 and (2) Torvisco’s March 1999  
17 debriefings. In his debriefings, Torvisco said that “Clarence” had the guns and drew a map to Clarence’s

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18  
19 <sup>7</sup> Similarly, in dicta the Supreme Court once stated while the case at issue did not require  
20 it to decide “how far” this rule might go, it was perhaps possible that the government could call  
21 witnesses not on the original list when the witnesses “afterwards c[ame] to the knowledge of the  
22 government, or bec[ame] necessary by reason of unexpected developments at the trial.” *Logan v.*  
23 *United States*, 144 U.S. 263, 306, 12 S. Ct. 617, 631, 36 L. Ed. 429 (1892), *disagreed with in*  
*part on other grounds by Witherspoon v. Illinois*, 391 U.S. 510, 523 n.22, 88 S. Ct. 1770, 1777  
n.22, 20 L. Ed. 2d 776 (1968).

24 <sup>8</sup> The cases cited by the government are no different. In *United States v. Rosenberg*, 195  
25 F.2d 583, 599 (2d Cir. 1952), a witness who was not named on the witness list was allowed to  
26 testify when “it was a reasonable inference from Schneider’s testimony that the government did  
27 not know of Schneider until the day before he was called as a witness, [and thus] it could not  
28 have included his name in the witness-list handed defendants before the trial.” Similarly, in  
*United States v. Schneider*, 21 D.C. 381 (Sup. Ct. D.C. 1893), a witness who was not named on  
the witness list was allowed to testify when the prosecutor stated “that he had not known of this  
witness until after the testimony for the defence had been commenced.”

1 mother's house. Ornelas goes by the name Clarence with his close friends. The government did not  
2 know if Clarence was a true name or a moniker. The map is accurate, but it is not detailed enough to  
3 enable someone who did not have an address to find the house without going door-to-door and street-to-  
4 street asking for "Clarence." An investigator in fact went out on one occasion but could not identify the  
5 house. A search of relevant law enforcement databases produced no hits on the name "Clarence." In  
6 regard to Torvisco's testimony, the Court finds that the government exercised all reasonable diligence.

7         However, by failing to follow up on Castillo's statement, made to the Los Angeles Police  
8 Department detectives in April 15, 1999, the government demonstrated a lack of diligence. Castillo's  
9 statement is clear, detailed, unequivocal, and provides many significant details of the case. Castillo  
10 states that he has information about the triple homicides that occurred in Montebello on November 19,  
11 1998. He says that Michael Ornelas has the guns and that he lives on Rogers Street in City Terrace.  
12 This is Ornelas's parents' house, a place he was frequently at. Therefore, he was easy to find and could  
13 have been interviewed far earlier than June 2001. Castillo also says that Psycho, true name Marcel  
14 Arevalo, was the getaway driver and had a blue van. Castillo says he knows the names of the shooters.  
15 His statement is clear, detailed, and potentially informative about crucial portions of the government's  
16 case: the identify of the shooters and the getaway driver, and what has happened to the murder weapons.

17         Further, the government in fact read this statement as it was preparing the case. The statement  
18 was bates numbered on December 27, 1999, so the government had it at least by that point. Initially, the  
19 government sought to use the statement against Castillo, and thus there was discussion with Arevalo's  
20 counsel about redacting out any mention of Arevalo. These discussions occurred in May of 2000. A  
21 court order dated May 11, 2000 confirms that the government and Arevalo's counsel had discussed the  
22 statement and their agreement clearly indicates that the government had actually looked at and read the  
23 statement. Even if the government did not originally give credence to the statement in December 1999,  
24 by May 2000, Castillo had been indicted for the murders of the three individuals in Montebello and the  
25 government also had by then developed the theory that Arevalo is the getaway driver. These  
26 developments gave credence to at least a portion of Castillo's statements.

27         In addition, the government only had two leads about the murder weapons: Castillo's statement  
28 and Torvisco's. While on first impression their statements about the weapons were inconsistent and not

1 completely corroborating, investigation would have shown them to be, on the whole, consistent with  
2 each other. The government was not confronted with multiple, contradictory, false leads about the  
3 murder weapons.

4 In such circumstances, by failing to follow up and investigate the information provided by  
5 Castillo, the government failed to exercise reasonable diligence. The failure to talk to Ornelas before  
6 this phase of the case began was not something out of the government's control. When questioned at a  
7 hearing on July 26, 2001 regarding follow-up on the statement, Detective Larry Martinez of the Los  
8 Angeles Police Department, with commendable honesty, agreed that the government's failure was a  
9 mistake and something they should have caught. He explained that Castillo's statement was inconsistent  
10 with Torvisco's statements, and when the statement first surfaced Torvisco was viewed as more reliable  
11 than Castillo. However, he agreed that later, by May 2000, Castillo's statement should have been  
12 investigated.

13 The Court finds that the government has at all times acted in good faith. However, good faith  
14 alone is not enough; it must be combined with diligence. Good faith alone is not enough because the  
15 statute could be easily obviated by a claim of good faith. Section 3432 is not a forgiving statute.  
16 Because of the societal interest in ensuring that the death penalty is imposed only as a result of the most  
17 reliable and fair procedures our system can offer, § 3432 does not excuse sloppiness or negligence on the  
18 part of the government.

19 However, not all mistakes or oversights should be treated the same. Here, the significance of  
20 Castillo's statement now is perhaps bolstered somewhat by hindsight, as the statement turns out to match  
21 the government's theory nearly completely except that Castillo says that "Spanky" rather than he was  
22 one of the shooters. In addition, the volume of evidence in this case cannot be overstated. The tape  
23 transcripts alone fill an entire room. This is the third group of defendants to be tried on this indictment.  
24 The first two trials last approximately six months each and this third one is estimated to last the same  
25 amount of time. If Castillo were the only defendant and there were only ten pieces of paper evidence,  
26 failure to follow up on the statement would be so sloppy and egregious that it would be inexcusable.  
27 Here, however, it is somewhat understandable that a lead would be missed and not followed up on. It is  
28 not excusable, but it is understandable.

1 If the government had intentionally left a name off the list, or acted in bad faith by providing no  
2 list at all, or displayed a lack of reasonable diligence that was not understandable under any  
3 circumstances, it would be appropriate to bar the new witness from testifying completely, without further  
4 consideration of the impact of the testimony on the defendants. Here, however, the Court will also  
5 weigh the impact on the capital defendants. This is particularly appropriate when, as here, defendants  
6 also had access to Castillo's statement at all relevant times. Thus, defendants also had seen the name of  
7 Michael Ornelas much earlier than when it came up in the midst of this phase of the trial.

8 One of the main benefits of § 3432 is to allow capital defendants ample time to prepare for  
9 witnesses prior to testimony. That benefit can be achieved here. Defendants have known about the  
10 government's discovery of Ornelas and Gonzales for at least a month. The Court will entertain a request  
11 for a further continuance from Jacobo and Castillo.

12 Defendants also argue that they would be prejudiced if Ornelas and Gonzales are allowed to  
13 testify because defendants have already cross-examined Torvisco on some of the same topics as  
14 contained in Gonzales's and Ornelas's proposed testimony, namely the guns. Their cross-examination  
15 was intended to suggest to the jury that Torvisco was lying about the guns being buried in Pico Rivera.  
16 If Gonzales and Ornelas now corroborate Torvisco's testimony, it might appear to the jury that defense  
17 counsel are not credible. In addition, the cross-examination has drawn the jury's attention to the issue of  
18 the guns and their burial. Thus, the defense's cross-examination has indirectly helped the government's  
19 case. In addition, Jacobo and Castillo would have preferred to be able to plan for witnesses with  
20 information as significant and probative, if believed, as the proposed testimony of Gonzales and Ornelas  
21 from the beginning of the case.

22 The Court does not discount these potential forms of prejudice. However, Ornelas and Gonzales  
23 did come to light during the portion of this trial that included Torvisco's testimony. He was asked about  
24 Clarence at the end of his testimony and identified Clarence's photograph. Thus, defendants did have  
25 some opportunity to shape their cross-examination of him based on the knowledge that the government  
26 had identified Ornelas and Gonzales and, through them, found the guns.

27 Further, at this point no option is perfect. Here, the Court must weigh two serious and  
28 sometimes competing concerns. On the one hand, the rights of defendants in capital cases are important

1 and to be protected. Complete exclusion would satisfy this concern. On the other hand, the truth-  
2 finding function of our court system is of vital importance to this Court and must be considered carefully  
3 in this case. Complete exclusion would potentially distort the truth-finding function because it would  
4 allow, for example, the jury to draw an inference that the murder weapons were never found when there  
5 is strong evidence to suggest that they have been located.

6 Weighing these concerns, the Court will allow Ornelas and Gonzales to testify but only in part.  
7 First, the government may not call Gonzales and Ornelas as witnesses against Jacobo or Castillo if it  
8 continues to proceed against them as death-eligible defendants. The government may call them against  
9 either or both of these defendants if it withdraws its notices of intent to seek the death penalty against  
10 them. *See Hall*, 410 F.2d at 660 (government “disavowed any intention of seeking the capital penalty”  
11 when defense counsel and district court raised issue of failure to comply with § 3432). As discussed  
12 earlier, the Court would then allow Gonzales to testify in full, without redaction, under *Boone*.

13 Second, § 3432 does not apply to rebuttal witnesses, and thus if Castillo or Jacobo’s defense case  
14 includes testimony that could be rebutted by Ornelas or Gonzales, they may testify in rebuttal.

15 Third, the government may call Gonzales and Ornelas to testify about their interactions with  
16 Arevalo and what they did with the guns. The Court recognizes that this testimony inferentially and  
17 indirectly bolsters the government’s case that Castillo and Jacobo are the shooters. However, it does not  
18 incriminate them directly. Given the competing concerns at issue, and especially given that Castillo and  
19 Jacobo will have enough time to prepare for cross-examination of Gonzales and Ornelas, this minimum  
20 level of prejudice is acceptable. In addition, the jury will be given a limiting instruction that it may  
21 consider the statements as evidence only relating to Arevalo.

22 Thus, Gonzales and Ornelas may testify as follows:

23 Gonzales’s testimony must exclude all references to Jacobo or Castillo. For example, he may not  
24 testify (1) about his conversations with Castillo; (2) about his relationships with Jacobo and Castillo;  
25 (3) that he was told to tell them that they should get out of the neighborhood; (4) that they “took care of  
26 some business”; (5) that he thought that Castillo and Jacobo had murdered someone; and (6) that he  
27 collected taxes for Castillo on two occasions. This list is not exhaustive, but illustrative only.

28 Gonzales’s testimony about conversations with Arevalo are admissible as the statement of a party

1 opponent. Fed. R. Evid. 801(d)(2)(A). Gonzales’s conversation with Mindy concerning the guns is  
2 admissible because she was conveying an instruction and thus the statement is not hearsay. Instructions  
3 are neither true nor false. An instruction may contain an implied assertion but it is not itself an assertive  
4 statement and thus is not hearsay under Federal Rule of Evidence 801(a)(2). *United States v. Zenni*, 492  
5 F. Supp. 464, 469 (E.D. Kent. 1980) (holding that betting instructions placed over the phone to a  
6 government agent are not hearsay).

7 Gonzales may testify about his conversations with Mindy concerning the guns, Arevalo’s “taking  
8 care of business,” and Arevalo’s membership in the Mexican Mafia. The rest of his testimony  
9 concerning the recovery and disposal of the guns is also admissible, subject to the ordinary rules of  
10 evidence.

11 Ornelas may testify about his interactions with Arevalo and about the guns. He may not testify  
12 about knowing Jacobo and Castillo as members of the City Terrace gang.

13 **V.**

14 **CONCLUSION**

15 For the reasons stated above, the Court holds that in the unique circumstances of this case, the  
16 appropriate remedy for the government’s failure to include Ornelas and Gonzales on the witness list is a  
17 partial exclusion of these witnesses’ testimony. They may not testify in any way that directly  
18 incriminates Jacobo or Castillo. However, they may testify about Arevalo and about the actions they  
19 took with the guns.

20  
21 IT IS SO ORDERED.

22 DATED: July 27, 2001

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DAVID O. CARTER  
United States District Judge